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U.S. DISTRICT COURT
INDIANAPOLIS DIVISION
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LAURA A. BRIGGS
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MDG INTERNATIONAL, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	
AUSTRALIAN GOLD, INC.,	)	
	)	1:07-cv-1096-SEB-TAB
Defendant.	)	

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, MDG International, Inc., (hereinafter "MDG"), by counsel, files this Complaint and Demand for Jury Trial against Defendant Australian Gold, Inc. and states as follows:

I. PARTIES, VENUE, AND JURISDICTION

1. MDG is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in North Miami Beach, Florida.

2. Australian Gold is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business in Indianapolis, Indiana.

3. This Court has subject matter jurisdiction over this Complaint pursuant to 28 U.S.C. §1332 in that the amount in controversy exceeds the sum or value of $75,000 and the parties are citizens of different States.

4. Venue is appropriate pursuant to 28 U.S.C. § 1391 in that Australian Gold is subject to personal jurisdiction in the Southern District of Indiana and in that the Parties have contractually consented to jurisdiction within this District. A copy of the Distributorship Agreement so stating is attached hereto as Exhibit 1. See Ex. 1, ¶ 7.4.

II. FACTUAL ALLEGATIONS

Background Information

5. MDG hereby incorporates by reference all other paragraphs of this Complaint as if fully set forth here.

6. MDG distributes sun tanning products to multiple countries.

7. On May 27, 1994, MDG and ETS, the corporate predecessor to Australian Gold, executed a Distributorship Agreement ("Agreement"). Ex. 1.

8. On November 1, 1997, ETS assigned its rights under the Agreement to Australian Gold. Ex. 2.

9. MDG's exclusive rights under the Agreement with regard to Australian Gold products began on May 27, 1994. The initial term ended on December 31, 1994 and renews automatically thereafter on a year-to-year basis. Ex. 1, ¶ 2.2.

10. The Agreement outlines various situations that would constitute good cause for the termination or non-renewal of the Agreement. Ex. 1, ¶ 5.1.

11. None of the conditions outlined in ¶ 5.1 of the Agreement have occurred.

12. Pursuant to the Agreement, MDG has the exclusive right to market, distribute, and sell Australian Gold tanning products in Territories as defined from time to time. Ex. 1, ¶ 2.1. The Agreement granted MDG exclusive distributorship rights within Latin America, the Caribbean and elsewhere to which additional territories were added over time.

13. The "Products" included in this exclusive right include tanning products manufactured and sold by Australian Gold under the name "Australian Gold." Ex. 1, ¶ 1.2.

14. The Agreement further states that Australian Gold "shall not market, distribute or sell Products inside the Territory nor authorize any person or entity other than [MDG] to do so." Ex. 1, ¶ 2.1.

Competing Sales

15. On information and belief, Australian Gold has marketed and sold Australian Gold tanning products to Starboard Cruise Services, which sells tanning products to at least cruise ships that are established and operating within MDG's exclusive Territories.

16. On information and belief, Australian Gold has marketed and sold Australian Gold tanning products to Walgreens knowing that Walgreens then distributes those products in MDG's exclusive Territory.

Registration Process

17. In order to sell Australian Gold products in most territories outside of the United States, proper registration with a governmental agency in each country is required. This is a lengthy process that can involve providing sample of bottles, certificates of ingredients, certificates of analysis, other specific tests and samples of the labels to show the exact text that will appear on the labels.

18. If changes are made to the ingredients, packaging, name, or label text, the registration process may need to be completed again.

19. MDG has received questions and concerns from health agency officials and customers concerning the meaning of numbers and letters that appeared on Australian Gold bottles. Specifically, MDG was questioned as to whether Australian Gold product packaging or labeling included an expiration date.

20. On June 23, 1997, Australian Gold provided MDG with written confirmation that Australian Gold tanning products do not have a listed expiration date on the bottles. Ex. 3.

21. On March 7, 2002, and June 18, 2002, Australian Gold provided MDG further written confirmation that the letters "EXP" that appear on Australian Gold products did not apply to the expiration date of the products but applied to the production date of the product. Ex. 4 & 5.

22. On September 18, 2002, Australian Gold provided MDG written confirmation that the combination of numbers and letters that appear on the back of the Australian Gold products are not related to the expiration dates of the products. Ex. 6.

23. Upon information and belief, on at least one occasion Australian Gold intentionally omitted part of batch numbers from shipping information provided to MDG so that the letters "EXP" and date information did not appear.

Shipments to Brazil

24. MDG sold in Brazil Products ordered from Australian Gold on multiple occasions.

25. In late 2005, a Brazilian government health agency discovered expired Products. It flagged these products for violating Brazilian expiration date regulations.

26. Certain of these were Products on which Australian Gold had omitted the letters "EXP" and date information in the shipping information sent to MDG.

27. Because these Products were expired, a recall had to be completed to collect all the expired products from the Brazil market and that product had to be destroyed.

28. The Brazilian government health agency also noted that other Australian Gold products were set to expire within a few months of their arrival in Brazil.

29. Products with impending expiration were unacceptable to customers. As a result, a national recall had to be completed to collect these products that could no longer be sold.

30. As a result, there was only a limited amount of Australian Gold products available for the Brazilian 2005/2006 summer season.

31. As requested by Australian Gold, the products with an impending expiration were collected from the Brazil market and shipped back to the United States.

32. Because Australian Gold shipped expired, or soon to be expired products, MDG lost significant sales, lost reputation and has suffered payment problems during the Brazilian 2005/2006 summer season and subsequent thereto.

33. MDG lost substantial goodwill with its local sub-distributors and retailers.

34. MDG incurred other costs designed to comply with local law.

35. Ultimately, in early 2007, Australian Gold provided limited credits to MDG related to the Brazilian problem. Additional damages remained uncompensated.

Unilateral Changes

36. After MDG discovered that it was being provided expired or nearly expired products, Australian Gold changed its course of dealing with MDG.

37. On November 30, 2006, Australian Gold sent MDG a letter that unilaterally proposed drastic amendments to the Agreement. Ex. 7.

38. The November 30, 2006, letter included the following unilateral changes: (i) MDG's exclusive territories would be changed to non-exclusive territories; (ii) the

structure of MDG's rebate program that had been in place since 2000 would be changed to MDG's detriment; (iii) MDG's terms of payment would be shortened from 180 days to 90 days; and (iv) MDG's prices would be increased. Ex. 7.

39. Since 2000, Australian Gold had provided a rebate program that allowed MDG to earn a 5% rebate on all purchases as well as up to an additional 8% rebate for reaching additional sales goals and was offered other unique incentive programs.

40. MDG consistently participated in the rebate programs and reached the different levels of sales goals to receive additional rebates on a yearly basis.

41. The November 30, 2006, letter eliminated MDG's ability to earn a maximum rebate of 13%.

42. In March 2007, consistent with the November 30, 2006 threat, new invoices were presented to MDG with 90-day payment terms instead of the standard 180-day terms, and invoices that previously had been issued with 180-day payment terms were amended to show a 90-day term on the account status.

43. This has caused harm to MDG's cash flow.

44. Australian Gold had previously informed MDG in writing that it would provide MDG with a new price list for the upcoming year by September 15, 2006.

45. MDG relied on this promise when dealing with its customers.

46. Australian Gold did not send the new price list until November 30, 2006 – two months after the promised date of September 15, 2006.

47. The price increases were inconsistent with the normal course of dealing between the parties.

48. In one instance, the 2007 price increase was 30% above the 2006 price.

Threatened Termination

49. Despite presenting sudden and radical changes to the Agreement in the November 30, 2006 letter, Australian Gold stated that it required a response within six business days. Ex. 7.

50. MDG expressed concern and disagreement with the proposed contract changes.

51. On December 15, 2006, Australian Gold notified MDG that it was electing not to renew the Agreement. Ex. 8.

52. MDG was forced to obtain legal counsel to prohibit Australian Gold from improperly terminating the Agreement.

53. Eventually, on February 12, 2007, Australian Gold informed MDG that it "agrees to the extension of the Distributorship Agreement for the term beginning January 1, 2007 and ending on December 31, 2007."

54. However, many of the other changes imposed in the November 30, 2006 letter remained in force.

55. Since this time, Australian Gold has knowingly and intentionally altered its course of dealing with MDG to constructively cancel the Agreement despite the Agreement's provisions that it can only be canceled for good cause.

(Failure to Supply)

56. The Agreement states that while Australian Gold may change production schedules for specified reasons, it must use reasonable efforts to ship product to MDG within seven (7) days of their receipt of MDG's orders. Ex. 1, ¶ 3.1.

57. MDG has experienced numerous shipping delays and backorder problems over time. On information and belief, not all of these delays fell within the terms of ¶3.1 of the Agreement.

58. Beginning in late 2006 and early 2007, MDG again experienced extensive backorder problems with Australian Gold. At one point, one of MDG's most popular products was on back order for nearly three months.

59. During this most recent time period, Australian Gold generally offered no explanation for the delays and did not provide estimated dates of shipment for products ordered by MDG.

60. Australian Gold is aware that most customers do not accept backorders.

61. These backorders have caused lost sales and lost profits and are making it difficult for MDG to reach it quotas under the Agreement for 2007.

(Denial of Product)

62. Pursuant to the Agreement, Australian Gold granted MDG the exclusive right to market, distribute, and sell tanning Products manufactured and sold by Australian Gold under the name "Australian Gold." Ex. 1, ¶ 1.2.

63. Since execution of the Agreement, and until this year, MDG had consistently been offered the entire Australian Gold product line for marketing and distribution within its exclusive territories.

64. Until 2007, Australian Gold made all tanning products sold by Australian Gold under the name "Australian Gold" available to MDG.

65. Despite requests and inquiries by MDG, Australian Gold has not offered MDG new Products that are currently available for purchase in the United States and Europe and some of which appeared in Australian Gold's 2007 brochures.

66. Australian Gold is affecting MDG's ability to meet its quota requirements by not offering it these new products.

67. By not having the ability to offer the entire Australian Gold product line, MDG's image has been discredited with its customers and sales have been lost.

(Quota Requirements)

68. The Agreement renews "automatically on a year-to-year basis in each Territory where [MDG] has met the Minimum Requirement for the preceding period." Ex. 1, ¶2.2.

69. The Agreement established initial quota requirements. Ex. 1, ¶2.3.

70. MDG fulfilled those specified quota requirements for 1993, 1994, and 1995.

71. Beginning in 1996, the quota requirements for each territory were no longer enforced. Since 1996, Australian Gold has evaluated MDG's performance by its overall purchases each year, rather than territory-by-territory.

72. In early 2007, for the first time since 1996, Australian Gold inquired about MDG's quota requirements for each territory.

73. Australian Gold asked MDG to submit detailed sales reports showing how many products were sold in each territory during 2006.

74. Given the history and course of dealing between Australian Gold and MDG, MDG believes that this belated request, together with contract violations and other conduct set forth herein, evidences an intent to breach and/or terminate the Agreement.

(4.22 Production)

75. Australian Gold outdoor products are typically sold in 8 oz. bottles.

76. Since 1999, Australian Gold has produced a 4.22 oz bottle because the price of the 8 oz. bottle can be too high to be competitive in some Territories.

77. In 2006 Australian Gold manufactured a line of thirteen products in the 4.22 oz. size production.

78. MDG worked to market and acquire orders for the 4.22 oz. bottles for 2007.

79. In June 2007, MDG placed orders for these products.

80. MDG is not receiving all the products it is ordering and believes that current production of the 4.22 oz. bottle has ceased.

(Unannounced Changes)

81. Australian Gold is aware that changes to product's ingredients, name, packaging or labeling may require a new registration process to be completed.

82. In 2007, MDG became aware of multiple unannounced changes to Australian Gold products. These included, but were not limited to, changes to labels, ingredients, names, bottle presentations, bottle colors, omitting the country of origin, and including a contradictory symbol.

83. MDG was not provided advance notification of any of these changes.

84. Australian Gold is aware of the consequences that MDG faces from unannounced product changes which include delay, increased registration/importation costs and customer confusion all of which have occurred.

III. LEGAL ALLEGATIONS

Count I: Breach of Contract

85. MDG hereby incorporates by reference all other paragraphs of this Complaint as if fully set forth here.

86. Australian Gold has knowingly and intentionally marketed and distributed Australian Gold products to distributors, including but not limited to Starboard Cruise Services and Walgreens, who market and sell these products within MDG's exclusive territories.

87. Australian Gold has failed to timely deliver products to MDG as required by the Agreement.

88. Australian Gold has refused to allow MDG to purchase the entire Australian Gold product line.

89. Australian Gold has apparently ceased current production of the 4.22 oz. bottle limiting or preventing sales thereof.

90. Australian Gold has implemented unannounced changes to Australian Gold products causing difficulties with the registration process.

91. Australian Gold provided MDG with products that had expired or would expire so soon as to compromise their importation, registration and saleability.

92. The actions in paragraphs 86 to 91 have prevented MDG from making sales and are making it difficult, if not impossible, to reach its quota for the present year.

93. Australian Gold has acted with bad faith in its dealings with MDG.

94. Australian Gold's actions constitute material breaches of the Agreement.

95. MDG has suffered economic losses and damages as a result of Australian Gold's breaches of contract in excess of $75,000. These losses and damages, which are ongoing, include:

a. Loss of profits from lost sales;

b. Reduction of value of MDG's distributorship and good name;

c. Loss of future revenues;

d. Unreimbursed expenses caused by Australian Gold's actions and failures.

Count II: Constructive Fraud

96. MDG hereby incorporates by reference all other paragraphs of this Complaint as if fully set forth here.

97. Australian Gold, as manufacturer, owes a duty to MDG, its distributor.

98. Australian Gold has violated this duty by making material misrepresentations of fact concerning the expiration date of Australian Gold products.

99. MDG reasonably relied on Australian Gold's statements to its detriment.

100. Australian Gold has benefited because of its misconduct.

101. Australian Gold's actions constitute constructive fraud.

102. MDG has suffered economic losses and damages as a result of Australian Gold's constructive fraud as identified in paragraph 95.

Count III: Actual Fraud

103. MDG hereby incorporates by reference all other paragraphs of this Complaint as if fully set forth here.

104. Australian Gold has made false, material misrepresentations of fact concerning the expiration dates of Australian Gold tanning products as set forth above.

105. Australian Gold's statements were made with knowledge that they were false or reckless disregard that they were false.

106. MDG reasonably relied on Australian Gold's material misrepresentations of fact.

107. Australian Gold's statements have injured MDG.

108. MDG has suffered economic losses and damages as a result of Australian Gold's actual fraud as identified in paragraph 95

IV. RELIEF REQUESTED

MDG requests the following relief:

a. All compensatory damages and economic benefits set forth above and lost as a result of Australian Gold's actions;

b. All costs and reasonable attorney fees as permitted by law;

c. Pre-judgment and post-judgment interest;

d. Punitive damages.

WHEREFORE, the Plaintiff, MDG International, Inc., requests a judgment in its favor, the costs of this action, trial by jury, and all other just and proper relief.

Respectfully Submitted,

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JURY DEMAND

Plaintiff, MDG International, Inc., by counsel, respectfully requests a trial by jury on all issues so triable.

Respectfully submitted,

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